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Supreme Court, U.S.
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No. 03-1599

IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug and alcohol testing of firefighters and other employees in safety-sensitive positions unless a municipality first can show direct evidence of substance abuse among the specific group to be tested.

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA"), since it establishment in 1935, has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. The National League of Cities ("NLC"), founded in 1924, represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Both *amici* have appeared before the Supreme Court and other federal and state tribunals.

Amici have a compelling interest in ensuring that cities retain the flexibility to decide whether (and how) to test their firefighters and other employees in safety-sensitive positions for drugs and alcohol. Cities around the country confront problems of substance abuse among firefighters and other first responders. Such substance abuse risks disastrous consequences if it causes an accident or impedes a firefighter's ability to fight a fire or to help others evacuate a burning building. If the Arizona Supreme Court's decision is allowed to stand, it will tie the hands of local governments and thwart their efforts to prevent such catastrophes.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for a writ of *certiorari* for three reasons.

First, the Arizona Supreme Court's decision conflicts with this Court's and other courts' decisions upholding suspicionless drug testing of public employees working in safety-sensitive positions. *See Nat'l Treasury Employees Union* v.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

Von Raab, 489 U.S. 656 (1989); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). In both *Von Raab* and *Skinner*, this Court held the government's compelling interests in deterring and detecting drug abuse among these employees outweighed the employees' reduced privacy interests. In reliance on *Von Raab* and *Skinner*, lower courts have rejected Fourth Amendment challenges to suspicionless drug and alcohol testing programs for firefighters and other employees in safety-sensitive positions. In direct conflict with the decision below, the Federal Circuit, the Sixth Circuit and the Maryland Court of Appeals have held that programs of suspicionless testing for firefighters do not violate the Fourth Amendment.

Second, the Arizona Supreme Court has decided an important question of federal constitutional law—namely the constitutionality of random testing programs for firefighters. While most firefighters perform their important duties ably, substance abuse remains a real problem at the nation's firehouses. To combat this problem, municipalities around the country have adopted (or are considering adopting) drug and alcohol testing programs. Review by this Court will provide much-needed guidance about the constitutionality of these important efforts.

Third, the Arizona Supreme Court's decision calls into doubt the constitutionality of numerous federal laws that mandate random testing for employees working in safety-sensitive positions. Of particular importance to localities, the decision below casts doubt on the constitutionality of the Omnibus Transportation Employee Testing Act of 1991 ("OTETA"), which conditions federal highway funds on the implementation of random testing programs for certain transit employees and public safety employees. Only this Court can provide the necessary guidance to local governments about whether their compliance with conditions for the receipt of federal funding comports with the Constitution.

ARGUMENT

I. The Arizona Supreme Court's Invalidation Of Mesa's Program Conflicts With The Decisions Of This Court And Several Lower Courts Consistently Holding That Suspicionless Testing Of Employees In Safety-Sensitive Positions Does Not Violate The Fourth Amendment.

The Fourth Amendment proscribes only "unreasonable" searches and seizures, U.S. Const. amend. IV, and this Court has articulated a clear framework for evaluating the reasonableness of a testing program. It should serve "special needs" beyond the normal need for law enforcement. *E.g., Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). It also must advance important governmental interests that outweigh the intrusion (if any) on the privacy of those tested. *E.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County* v. *Earls*, 536 U.S. 822, 829 (2002). Here, the Arizona Supreme Court correctly found (as Respondent conceded) that the City of Mesa's program served special needs beyond law enforcement. Appendix to Petition For a Writ of *Certiorari* ("App.") 6a. Yet its analysis of the governmental and privacy interests collides with this Court's precedents on the constitutionality of suspicionless testing generally and widens a disagreement among the lower courts over the constitutionality of such testing in the specific context of firefighters and other public employees in safety-sensitive positions.

A. The Arizona Supreme Court's decision conflicts with this Court's decisions in *Von Raab* and *Skinner*.

This Court consistently has held that the Fourth Amendment does not bar suspicionless drug testing of employees in safety-sensitive positions. In *Von Raab*, the Court upheld a program of suspicionless drug testing of certain employees in the United States Customs Service. 489 U.S. at 668. The Court held that the government had a "compelling interest in

ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," and that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 670-71. It also found that "operational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts" and that customs officers "reasonably should expect effective inquiry into their fitness and probity." *Id.* at 671-72 (internal quotations and citation omitted). Because the government's interests outweighed the employees' privacy expectations, the Court rejected the Fourth Amendment attack. *Id.* at 677.

In *Skinner*, the Court upheld a program of suspicionless drug testing (including urinalysis) of railroad employees following an accident. As in *Von Raab,* the Court held that the government had a "compelling" interest in testing because the railroad employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" and "can cause great human loss before any signs of impairment become noticeable to supervisors or others." 489 U.S. at 628. On the other side of the balance, the Court found the intrusions on privacy to be "limited." *Id.* at 625. The urine sample was not furnished under direct observation and was reviewed by medical personnel unrelated to the employer. Moreover, railroad employees worked "in an industry that is regulated pervasively to ensure safety" and thus had "a diminished expectation privacy" in information about their physical condition. *Id.* at 626-27. Balancing these interests, the Court upheld the program. *Id.* at 633.

The Arizona Supreme Court's decision striking down Mesa's program cannot be reconciled with *Von Raab* and *Skinner*. Just like the employees in *Von Raab* and *Skinner*, firefighters occupy safety-sensitive positions—a fact that

every court in this case has acknowledged. App. 7a (Supreme Court), 30a-31a (Court of Appeals), 52a (trial court). As the Arizona Court of Appeals explained, Mesa's interest in testing those employees is compelling:

> Firefighters must be mentally alert at all times in order to instantly respond to a crisis and grasp and follow orders, particularly where a split-second decision or error in judgment may prove fatal; they also must be physically fit in order to perform under the extremely demanding and dangerous conditions that jeopardize their own lives, the lives of their co-workers, and the lives and property of the public. App 30a.

The Arizona Supreme Court sought to distinguish *Von Raab* on the ground that "[Mesa's] firefighters are not directly involved in drug interdiction, do not carry a firearm, and are not required to use deadly force in the regular course of their duties." App. 10a. This crabbed reading of *Von Raab* is untenable. While the *facts* of *Von Raab* may have been so limited, the decision's *reasoning* swept more broadly to cover a variety of safety-sensitive settings. 489 U.S. at 675 n.3 (approving suspicionless scanning of passenger luggage at airports due to the risk of terrorism).

The Arizona Supreme Court also claimed that "the firefighters' communal work environment provides a better opportunity for supervisors to detect drug use and therefore develop reasonable suspicion to conduct a test under appropriate circumstances." App. 10a. Yet "[d]etecting drug impairment on the part of employees can be a difficult task," *Von Raab*, 489 U.S. at 674, and it is absurd to expect firefighters or their supervisors to become expert in the art of detection. *See Skinner*, 489 U.S. at 628. Moreover, the "communal work environment" may *discourage* rather than encourage reporting if employees are reluctant to share their speculative suspicions about a fellow employee with whom they must live and work on a regular basis. As the Arizona Court of Appeals explained, firefighters' communal work

environment "engenders camaraderie and a certain esprit de corps" that "may make testing dependent on individualized suspicion less effective or less likely to occur." App. 31a.

Similarly faulty reasoning infects the Arizona Supreme Court's analysis of firefighters' privacy interests. The Arizona Supreme Court acknowledged that "individuals who elect to become firefighters should anticipate a diminished expectation of privacy and should reasonably expect some intrusion into matters involving their health and fitness," App. 12a, yet concluded that the testing impermissibly invaded these admittedly reduced privacy expectations. That conclusion also collides with *Von Raab* and *Skinner*. The precautions taken by Mesa to ensure the firefighters' privacy—urination in a private stall, testing only for the presence of certain illicit substances, analysis by a medical officer and confidential treatment of the results—strongly resemble the types of precautions that caused this Court to uphold the programs in *Von Raab* and *Skinner*. *Von Raab*, 489 U.S. at 672 n. 2; *Skinner*, 489 U.S. at 626-27; *see also Earls*, 536 U.S. at 832-33 (upholding random drug testing program that, like Mesa's, specified that the urine sample could be provided in a closed stall and required that test results be kept in confidential files). Thus, had the Arizona Supreme Court properly applied *Von Raab* and *Skinner*, it would have concluded, as the Arizona Court of Appeals did, that Mesa's program does not violate the Fourth Amendment.

B. The Arizona Supreme Court's decision conflicts with several lower courts' decisions that have upheld suspicionless testing programs for firefighters and other employees in safety-sensitive positions.

Unsurprisingly, the decision below throws the Arizona Supreme Court into conflict with other lower courts over the constitutionality of random testing of firefighters. Following *Von Raab* and *Skinner*, several lower courts have sustained

suspicionless testing programs for firefighters and other employees in safety-sensitive positions. *See generally* Kathleen M. Dorr, Annotation, *Validity, Under Federal Constitution, of Regulations, Rules, or Statutes Requiring Random or Mass Drug Testing of Public Employees or Persons Whose Employment is Regulated by State, Local, or Federal Government*, 86 A.L.R. Fed. 420 § 3[d] (1988 & Supp. 2003) (collecting cases). For example, the Federal Circuit unanimously rejected a Fourth Amendment challenge to a random drug testing program for firefighters on military bases. *Hatley* v. *Dep't of the Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998). The court found that "the government's compelling interest in keeping its firefighters free of drugs outweighs [firefighters'] expectation of privacy. . . ." *Id.*

Similarly, Maryland's highest court unanimously rejected a Fourth Amendment challenge to a program of suspicionless drug testing of police and firefighters. *City of Annapolis* v. *UFCW, Local 400*, 565 A.2d 672, 682-83 (Md. 1989). Like the Federal Circuit in *Hatley*, the Maryland Court of Appeals concluded that "[t]he City's interest in the safety of uniformed police or fire personnel, their co-workers, and the public served by them is of a sufficient compelling nature that [it] substantially outweighs the negligible private interest here involved." 565 A.2d at 681.

Finally the Sixth Circuit, sitting *en banc*, unanimously held that the Fourth Amendment does not require reasonable suspicion as a precondition to testing firefighters for drugs and alcohol. *Penny* v. *Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) (*en banc*). Tellingly, in *Penny*, the full Sixth Circuit *vacated* panel opinions that had *struck down* suspicionless testing programs for firefighters and police officers on Fourth Amendment grounds, finding those panel opinions irreconcilable with *Von Raab* and *Skinner*. *Id.*, *vacating Lovvorn* v. *City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) and *Penny* v. *Kennedy*, 846 F.2d 1563 (6th Cir. 1988).

A few courts have sided with the Arizona Supreme Court and invalidated random drug testing programs for firefighters under the Fourth Amendment.[2] The Alaska Supreme Court recently held that a program of random drug testing of firefighters violated the Fourth Amendment's analogue in Alaska's state constitution. *See Anchorage Police Dep't Employees Ass'n* v. *Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001). *Cf. Guiney* v. *Police Comm'r of Boston*, 582 N.E.2d 523, 524-27 (Mass. 1991) (holding that random drug testing of police officers violated Massachusetts Declaration of Rights but not the Fourth Amendment). While the Alaska Supreme Court anchored its holding in state law, its analysis will influence the federal constitutional analysis of other courts. *See* App. 15a (finding the Alaska Supreme Court's constitutional analysis "persuasive").

This Court should intervene to resolve this widening disagreement among the lower courts over the constitutionality of suspicionless drug testing of firefighters. Under the reasoning of several federal and state appellate courts, Mesa's program likely would have survived Fourth Amendment challenge.[3] Under the reasoning of the Arizona Supreme Court, the programs at issue before the Federal Circuit, the Sixth Circuit and the Maryland Court of Appeals probably would have violated the Fourth Amendment.

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[2] *See Beattie* v. *City of St. Petersburg Beach*, 733 F. Supp. 1455 (M.D. Fla. 1990); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *City of Palm Bay* v. *Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985).

[3] Several federal district courts and state intermediate appellate courts also have rejected Fourth Amendment challenges to suspicionless drug testing programs for firefighters. *See, e.g., Aguilera* v. *City of East Chicago Fire Serv. Comm'n*, 768 N.E.2d 978 (Ind. Ct. App. 2002); *Doe* v. *City and County of Honolulu*, 816 P.2d 306 (Haw. Ct. App. 1991) (*per curiam*); *Am. Fed'n of Gov't Employees, Local 1533* v. *Cheney*, 754 F. Supp. 1409 (N.D. Cal. 1990); *Plane* v. *United States*, 750 F. Supp. 1358 (W.D. Mich. 1990); *Brown* v. *Winkle*, 715 F. Supp. 195 (N.D. Ohio 1989).

Read more broadly, the Arizona Supreme Court's decision also clashes with numerous appellate court decisions that have rejected Fourth Amendment challenges to testing of employees in other safety-sensitive occupations. For example, a panel of the First Circuit, including then-Judge Breyer, upheld a program of random drug testing of police officers carrying firearms and involved in drug interdiction. *Guiney* v. *Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989) (*per curiam*). The First Circuit found the case indistinguishable from *Von Raab*. *Id.* Other appellate courts have rejected similar challenges to suspicionless drug testing programs for employees such as police officers, prison guards and nuclear power plant employees.[4] Under the Arizona Supreme Court's reasoning, many of these programs might have violated the Fourth Amendment.

C. The Arizona Supreme Court's insistence on evidence of substance abuse among Mesa's firefighters conflicts with this Court's and other courts' decisions and offends federalism principles.

Central to the Arizona Supreme Court's decision was its complaint that the City of Mesa had failed to put forth any evidence of drug or alcohol abuse by Mesa's firefighters. In the Court's view, "the City has failed to define a real and

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[4] *See also Piroglu* v. *Coleman*, 25 F.3d 1098 (D.C. Cir. 1994) (emergency medical technicians trainees); *Policeman's Benevolent Ass'n of New Jersey* v. *Washington*, 850 F.2d 133 (3d Cir. 1988) (police officers); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (certain prison guards); *Am. Fed'n of Gov't Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (aircraft mechanics); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (*per curiam*) (civilian defense employees at army proving ground); *Rushton* v. *Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *Int'l Bhd. of Elec. Workers, Local 1245* v. *USNRC*, 966 F.2d 521 (9th Cir. 1992) (same); *Alverado* v. *Wash. Pub. Power Supply Sys.*, 759 P.2d 427 (Wash. 1988) (*en banc*) (prospective nuclear power plant employees).

substantial risk that random, suspicionless testing is designed to address." App 11a. This insistence on localized evidence of a problem conflicts with this Court's jurisprudence and other lower court decisions.

Earls, *Skinner* and *Von Raab* all make clear that actual evidence of abuse is not necessary to sustain a program of suspicionless testing. Two terms ago in *Earls*, the Court reaffirmed that it "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." 536 U.S. at 835. Likewise, in *Von Raab*, the Court upheld the suspicionless drug testing program for certain customs employees despite the absence of any documented abuse by those employees. 489 U.S. at 673; *id.* at 681 (Scalia, J., dissenting) (noting that "neither frequency of [drug] use nor connection to harm is demonstrated"). In *Skinner*, while the Government supplied some evidence of substance abuse by railroad employees, the Court's analysis of the Fourth Amendment issue did not turn on the existence of that evidence. 489 U.S. at 628-33; *see also Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 675-76 (1995) (O'Connor, J. dissenting) (individualized suspicion was impractical in *Von Raab* and *Skinner* because "even one undetected instance of wrongdoing could have injurious consequences for a great number of people"). To require that the City of Mesa come forth with specific evidence of drug and alcohol abuse, as the Arizona Supreme Court did, is to ignore this long line of decisions.

Chandler v. *Miller*, 520 U.S. 305 (1997), offers no refuge to the Arizona Supreme Court. In *Chandler*, this Court struck down a Georgia law requiring candidates for certain statewide political office to submit to drug testing and to certify that the results of their drug tests were negative. *Chandler* highlighted the lack of evidence of drug abuse among such individuals but carefully cabined its holding to cases where

"public safety is not genuinely in jeopardy." *Id.* at 323. Here, unlike in *Chandler*, substance abuse by the covered group (firefighters) places public safety in jeopardy.

The Arizona Supreme Court's demand for empirical evidence also conflicts with several lower court decisions that have not required evidence of abuse to sustain a program of suspicionless testing of firefighters and other employees in safety-sensitive positions. For example, the Ninth Circuit, typifying the views of numerous federal circuits, has declared that "nothing in Supreme Court precedent predicates the constitutionality of a drug testing program on the preexistence of a drug abuse problem in the group to be tested." *Int'l Bhd. of Teamsters* v. *Dep't of Transp.*, 932 F.2d 1292, 1305 (9th Cir. 1991).[5] None of the courts rejecting Fourth Amendment challenges to the suspicionless testing of firefighters has required evidence of substance abuse. *See City of Annapolis*, 565 A.2d at 681-82; *Hatley*, 164 F.3d at 603-04; *Penny*, 915 F.2d at 1066-67. *Cf. Wilcher* v. *City of Wilmington*, 139 F.3d 366, 378 (3d Cir. 1998). In *City of Annapolis*, the Maryland Court of Appeals emphatically rejected the need for empirical evidence of substance abuse: "Merely because there presently is no known illegal drug use among the covered employees does not compel its condemnation on Fourth Amendment grounds. A documented drug problem need not

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[5] *See also Knox County Educ. Ass'n* v. *Knox County Bd. of Educ.*, 158 F.3d 361, 379 (6th Cir. 1998); *Aubrey* v. *Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 563 (5th Cir. 1998); *Dimeo* v. *Griffin*, 943 F.2d 679, 684 (7th Cir. 1991) (*en banc*) ("[G]overnment is not limited to addressing public safety problems after serious accidents reveal its want of foresight."); *Int'l Bhd. of Elec. Workers, Local 1245* v. *Skinner*, 913 F.2d 1454, 1461-62 (9th Cir. 1990); *Taylor*, 888 F.2d at 1194 ("[T]he government is not required to show that the group to be tested as a whole suffers from any incidence of drug abuse."); *Harmon* v. *Thornburgh*, 878 F.2d 484, 487 (D.C. Cir. 1989) ("Nor is it necessary that a documented drug problem exist [*sic*] within the particular workplace at issue.").

exist within the place of employment." 565 A.2d at 682. The Arizona Supreme Court, by contrast, virtually demanded such evidence as a condition for upholding Mesa's program.

The Arizona Supreme Court's insistence on evidence of substance abuse within the jurisdiction conducting the testing also offends federalism principles. The performance of safety-sensitive jobs in this country reflects a careful allocation of responsibilities between federal, state and local officials. For example, federal officials ordinarily have substantial responsibilities at areas such as the nation's borders or the nation's airports. *See United States* v. *Flores-Montano*, 124 S. Ct. 1582, 1585-86 (2004) (borders); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001), *codified at* scattered sections of Title 49 of the U.S. Code (airports). By contrast, firefighting and police protection "'are typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services'" and "epitomize the concerns of local, democratic self-government." *Garcia* v. *San Antonio Metro, Transit Auth.*, 469 U.S. 528, 575 (1985) (Powell, J. dissenting) (quoting *Nat'l League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976)). Under the Arizona Supreme Court's logic, the threshold evidence necessary to sustain a program of random testing will depend partly on which jurisdiction has responsibility for the employees. For a federal responsibility, evidence of abuse by customs officers *anywhere* might support a nationwide program of random testing for those employees. By contrast, for a local responsibility, evidence of abuse in one locality would not support a program of random testing in another locality. This approach turns federalism on its head. It holds local governments to a higher standard of proof before they can implement random testing programs that might well pass constitutional muster if the same quantum of proof were provided for a federal program.

Requiring jurisdiction-specific evidence of drug and alcohol abuse as a prerequisite to random testing would be disastrous for local governments. Such a requirement does not allow localities to "prevent" substance abuse, as *Von Raab* permits, 489 U.S. at 674, and forces the public to "bear the risk" that undiscovered employees who suffer from substance abuse problems could put them in harm's way, *id.* at 671. Moreover, it may be difficult for jurisdictions to generate a statistically significant sample. Fire service in the country is generally handled locally. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook "Firefighting Occupations" 2 (2004-05 ed.) ("About 9 out of 10 firefighting workers were employed by municipal or county fire departments."). In many areas, fire departments may employ only a small number of individuals. *Id.* In such small departments, the incidence of abuse may not be widespread, yet the potential social costs of a substance abuser on duty are grave. The Arizona Supreme Court's decision supplies no guidance to local government on the quantum of proof necessary to justify a program of random testing. Are ten employees sufficient? If so, then fire departments in small towns may never be able to conduct random testing. Or must a statistically significant percentage of personnel be abusing substances before a city may act? If so, then fire departments in large cities may have to await rampant abuse before random testing can begin.

D. The Arizona Supreme Court's preference for a program based on individualized suspicion conflicts with this Court's settled principle that the Fourth Amendment does not require governments to employ the least intrusive means and ignores the greater risks of discrimination in such a program.

It bears emphasis that the policy challenged in this case, random testing, is but one piece of a larger strategy adopted

by the City of Mesa to deter and to detect substance abuse by its firefighters. That strategy also authorizes tests on the basis of reasonable suspicion, after an on-the-job accident, following a return to duty, or as a follow-up to "a determination that a covered member is in need of assistance." App 3a n. 2. The Arizona Supreme Court criticized the City of Mesa for failing to demonstrate why these remaining components of its strategy did not adequately serve the City's goals of deterring and detecting substance abuse. App. 8a n. 4. That reasoning conflicts directly with this Court's doctrine.

In the specific context of suspicionless drug tests, this Court repeatedly has made clear that the Fourth Amendment does *not* require governments to adopt the least restrictive means to address a societal problem. In *Earls*, the respondents employed the precise line of argumentation adopted by the Arizona Supreme Court and suggested that a drug testing program based on individualized suspicion would address the school district's concern about deterring and detecting drug use. This Court rejected that argument and cited a long line of decisions holding "that reasonableness under the Fourth Amendment does not require employing the least intrusive means." *Earls*, 536 U.S. at 837-38.

Earls explained how a testing program based on individualized suspicion actually might be inferior to a program of random testing. Individualized suspicion "might unfairly target members of unpopular groups" and "[t]he fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.* at 837 (citing *Acton*, 515 U.S. at 663-64). Here, the City of Mesa's system of computer-generated names, *see* App. 2a, avoids the pitfalls that this Court spelled out in *Earls* and *Acton*. The Arizona Supreme Court's decision ignores this important consideration.

II. The Constitutionality Of Testing Programs For Firefighters And Other Public Employees In Safety-Sensitive Positions Is A Matter Of National Importance Warranting This Court's Review.

Firefighters play a critical role in the provision of safety and first-responder services by municipal governments. As the Sixth Circuit has explained:

> Fighting fires is perhaps the most dangerous and hazardous of all professions. It is imperative that those who are charged with the public responsibility of extinguishing fires, sometimes risking their own lives for the sake of someone trapped, be free of the debilitating influences of controlled substances. It is well established that the use of such substances, such as marijuana, can adversely affect one's perception, decision-making time, short-term memory, motor skills, and judgment. Fire fighters so affected become a risk to themselves, their fellow fire fighters, and those depending on them for rescue.

Lovvorn, 846 F.2d at 1544; *see also City of Annapolis*, 565 A.2d at 681 (citing *Lovvorn* with approval). In the post-September 11 world, moreover, firefighters' duties extend far beyond the most familiar ones:

> The range of services provided by America's fire service continues to expand. In many areas, the local fire department is responsible for mitigating hazardous materials incidents, performing technical rescues, and providing emergency medical services. The threat of terrorist incidents further increases the fire department's responsibility, as firefighters must be taught to recognize the signs of a chemical or biological attack and the proper response.

U.S. Fire Admin., Fed. Emergency Mgmt. Agency, Trends and Hazards In Firefighter Training 2 (May 2003), *at* http://www.usfa.fema.gov/downloads/pdf/publications/tr-100.pdf.

While most firefighters discharge their duties honorably, substance abuse remains a substantial problem in the nation's firehouses. A recent study of New York City firefighters and emergency medical workers by Cornell University researchers estimates that 17% of firefighters are at risk for a moderate alcohol problem and 11% are at risk for a severe alcohol problem. Samuel B. Bacharach & Hilary Zelko, On the Front Line: The Work of First Responders in a Post 9/11 World, 26 (2004), *at* www.news.cornell.edu/releases/April04/FirefighterStress.pdf. In 2004, the number of New York City firefighters treated for drug and alcohol abuse jumped *fifty percent* in one year. Michelle O'Donnell, *Increase Seen in Treatment for Firefighters*, N.Y. Times, March 20, 2004, at B1. Numerous other examples from cities around the country demonstrate that substance abuse among the nation's firefighters is not an isolated problem. *See generally* Carol S. North *et al.*, *Coping, Functioning, and Adjustment of Rescue Workers after the Oklahoma City Bombing*, 15 J. Traumatic Stress 171 (2002) (noting that "alcohol misuse is a widespread problem in firefighters").[6]

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[6] *See, e.g.*, Angie Leventis, *Leaders saw signs of chief's drug use;* Morning News Trib., May 7, 2004, at B01 (City of DuPont, Washington fired its fire chief last year for abusing drugs); *Suspended S.F. Firefighters Test Positive for Banned Substances*, Contra Costa Times, Mar. 3, 2004, at 4 (San Francisco firefighters tested positive for marijuana and alcohol during surprise raid on firehouse); Briefs, South Bend Trib., Feb. 18, 2004, *available at* 2004 WL 71093225 (veteran Indiana firefighter dismissed after allegedly reporting to work while under the influence of marijuana); Cary Aspinwall, *Police Drug Testing Still Being Planned*, Tulsa World, Feb. 20, 2003, at A1 (Tulsa, Oklahoma firefighters tested positive for drugs); Matt Sabo, *Grand Jury Ties No Criminal Act to Firefighter's Death*, The Oregonian, July 30, 2003, at C01 (volunteer firefighter died after excessive consumption of bourbon); City of Madison Fire Department, Decisions of the Madison Bd. of Police and Fire Comm'rs, *at* www.ci.madison.wi.us/fire/PFCdecisions/PFCdecisions.htm (collecting disciplinary actions against Madison firefighters, including ones for substance abuse).

The consequences of such substance abuse are potentially grave. For example, this February, a firefighter, high on cocaine, crashed his fire truck into another while racing to a fire in New York City, causing a multi-car pile up and injuring thirteen people. Lisa Fleisher and Don Singleton, *Crash Firefighter Coked Up: FDNY*, N. Y. Daily News, Feb. 29, 2004, at 5. In Wyoming, a drunken firefighter drove a tanker truck into a colleague, crushing and killing him. Robert W. Black, *Accidents Put Alcohol Policies Under Scrutiny*, Cin. Post, Nov. 21, 2003, at A22.

To combat problems of this sort and to prevent potentially devastating accidents, local governments around the country have adopted random testing programs.[7] Other jurisdictions such as New York City are planning to implement such

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[7] In addition to Mesa's program, see *Anchorage Police Dep't Employees Ass'n*, 24 P.3d 547 (random drug testing for Anchorage firefighters); *Doe*, 816 P.2d 306 (random testing for Honolulu firefighters); *Wilcher*, 139 F.3d 366 (random drug testing for Wilmington firefighters); *Aguilera*, 768 N.E.2d 978 (random testing for East Chicago firefighters); *Woods* v. *Metro. Gov't of Nashville & Davidson County*, No. M2001-03143-COA-R3-CV, 2003 WL 22938947 (Tenn. Ct. App., Dec. 10, 2003) (random drug testing for firefighters in Metropolitan Nashville Fire Department); Gastonia, N.C., Substance Abuse Policies and Administrative Procedures § 4.5 & Att. B (2004) (random drug and alcohol testing for firefighters); Spanish Fork City, Utah, Controlled Substance and Alcohol Testing §1.50.070 (same); Ark. Mun. League, Sample Non-CDL Drug Testing Ordinance for Arkansas Cities and Towns §§ 3, 8(b) (Ark. Mun. League 2004) (random drug testing for employees in safety-sensitive positions); Fran Spielman, *No firefighter drug tests 1 year after they were ok'd*, Chi. Sun-Times, Mar. 26, 2004, at 20 (random drug testing of Chicago firefighters as part of collective bargaining agreement); Adam Klawonn, *Random Drug Tests by Mesa are Illegal*, Ariz. Republic, Jan. 28, 2004, at B1 (random drug testing for firefighters in five Arizona cities, including Phoenix); Rachel Webb, *Springdale Board Weighs Jailer Drug Tests*, Ark. Democrat-Gazette, Jan. 13, 2003, at 7 (random drug testing for firefighters in Springdale, Arkansas).

programs.[8] Such random testing has the potential to be extremely effective. One government study found that approximately twenty-eight percent of employees currently using illicit drugs would be less likely to work for an employer who tested randomly for drugs, a higher percentage than if the employer merely tested upon suspicion or following an accident. Substance Abuse and Mental Health Servs. Admin., U.S. Dep't of Health and Human Servs., Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National House-hold Survey on Drug Abuse" Table 5.4, *available at* http://www.oas.samhsa.gov/NHSDA/A-11/WrkplcPlcy2-3.htm#Tb54.

The decision below casts serious doubts over the constitutionality of such policies. Review by this Court will provide much-needed guidance over cities' important efforts to prevent the disasters caused by a firefighter working under the influence of drugs or alcohol.

III The Arizona Supreme Court's Decision Calls Into Doubt The Constitutionality of Federal Laws Requiring Municipalities And Other Entities To Employ Random Testing.

Congress has enacted detailed laws "[r]egarding drug use by persons in safety-sensitive positions," *Eastern Assoc. Coal Corp.* v. *United Mine Workers of Amer.*, 531 U.S. 57, 67 (2000), several of which require random testing. The Arizona Supreme Court's decision calls into doubt the constitutionality of these laws, including, among others, the Omnibus

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[8] *See* Patrick Healy, *Expressway Argument Leads to Arrest of Firefighter*, N.Y. Times, Apr. 12, 2004 at B-3 (New York Fire Commissioner announces plans to conduct random tests of 11,500 firefighters and 3,000 emergency workers).

Transportation Employee Testing Act of 1991 ("OTETA"), Pub. L. 102-143, 105 Stat. 952.[9] For this independent reason, the decision below warrants this Court's review.

Each year, state and local governments receive substantial transportation funds from the Federal Transit Administration. *See O'Brien* v. *MBTA*, 162 F.3d 40, 41-42 (1st Cir. 1998). As a condition of that assistance, the OTETA requires recipients and their contractors to conduct various forms of drug and alcohol testing, including random testing, of certain covered employees working in safety-sensitive positions. 49 U.S.C. § 5331(b) (authorizing regulations); 49 C.F.R. § 655.21, -.31 (requiring random drug and alcohol testing). Those covered employees include individuals who must carry firearms for security purposes and certain holders of commercial driver's licenses, which may include firefighters. 49 C.F.R. § 655.4; *O'Brien*, 162 F.3d at 42.[10] A recipient that fails to conduct this testing loses its eligibility for the federal funds. 49 U.S.C. § 5331(g).

The decision below throws into doubt the constitutionality of this scheme. Nothing in the OTETA or its implementing regulations limits the random testing program to jurisdictions that have a history of drug or alcohol abuse among its covered employees. Nor does the OTETA confine the use of random testing to situations where other forms of testing (pre-employment, post-accident, individualized suspicion) have

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[9] The decision below also calls into question other federal laws providing for random drug and alcohol testing. *See* 49 C.F.R. § 219.601, -.607 (certain employees in the railroad industry); 49 C.F.R. § 382.305 (certain holders of commercial drivers licenses); 49 C.F.R. § 199.105(c) (emergency employees at pipeline facilities); 14 C.F.R. Pt. 121 App. I, V.B (airline employees performing safety-sensitive functions).

[10] *See, e.g.*, Christopher Tritto, *Ambulance Board to Debate Drug Policy*, Charleston Gazette, Mar. 22, 2003, at 5C (noting that Charleston City Council requires holders of commercial driver's licenses, including firefighters, to be subject to random drug testing).

proven unsuccessful. As a consequence, the blanket requirement of random testing for safety sensitive employees under OTETA probably would not pass constitutional muster before the Arizona Supreme Court.

The decision below puts state and local governments in an intractable bind. In order to qualify for the federal funds, those governments must implement random testing programs. Yet, except for those jurisdictions with pre-existing substance abuse problems among its covered employees, any such program, under the Arizona Supreme Court's decision, probably would violate the Fourth Amendment. As a consequence, the decision below forces governments to choose between surrendering much-needed federal support and knowingly committing an alleged Fourth Amendment violation, thereby risking civil liability. *See* 42 U.S.C. § 1983. Only this Court can dispel the doubts over the constitutionality of the OTETA and provide the necessary guidance to local governments over the constitutionality of the federally mandated random testing programs.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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